No. 98-90

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In The

Supreme Court of the United States

October Term, 1997

RICHARD BOLT, M.D. and RICHARD BOLT, M.D., P.A.,

Petitioners,

vs.

DAYTONA COMMUNITY HOSPITAL; ORMOND BEACH MEMORIAL HOSPITAL; RICHARD BOYE, M.D.; RALPH MARINO, M.D.; SHED ROBERSON, M.D.; and ALVIN SMITH, M.D.

Respondents.

On Petition for Writ of Certiorari to the United States Court of Appeals for the Eleventh Circuit

BRIEF IN OPPOSITION FOR RESPONDENTS DAYTONA COMMUNITY HOSPITAL, RICHARD BOYE, M.D., AND RALPH MARINO, M.D.

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QUESTION PRESENTED FOR REVIEW

Whether the United States Court of Appeals for the Eleventh Circuit abused its discretion in affirming the denial by the United States District Court for the Middle District of Florida of Petitioner's Motions for Relief from Judgment under Rules 60(b)(4) and 60(b)(6) of the Federal Rules of Civil Procedure.

PARENT COMPANY AND NONWHOLLY OWNED SUBSIDIARIES

Respondent, Daytona Community Hospital, pursuant to Rule 29(6), provides the following list demonstrating the corporate hierarchy of the former Daytona Community Hospital:

> Columbia/HCA Healthcare Corporation is the parent company of the following entities: Western Plains Regional Hospital, Inc.; Galen Health Care, Inc.; Galen Holdings, Inc.; Daytona Medical Center, Inc.; d/b/a Atlantic Medical Center — Daytona f/k/a Columbia Medical Center — Daytona f/d/b/a Daytona Community Hospital, which has no nonwholly owned subsidiaries.

PARTIES TO THE PROCEEDING

Petitioner is: Richard A. Bolt, M.D., and his professional association, Richard A. Bolt, M.D., P.A.

Respondents are: Daytona Community Hospital n/k/a Atlantic Medical Center — Daytona; Ormond Beach Memorial Hospital; Richard Boye, M.D.; Ralph Marino, M.D.; Shed Roberson, M.D.; and Alvin Smith, M.D.,

STATEMENT ON PARTIES AND ABBREVIATIONS

Respondents, Daytona Community Hospital, Richard Boye, M.D. and Ralph Marino, M.D. are referred to herein as "Respondents." Richard A. Bolt, M.D. and Richard A. Bolt, M.D., P.A. are referred to herein as the "Petitioner" or simply, "Bolt." Citations to the documents referenced as Exhibits to the Record on Appeal, have been abbreviated as "(ER — volume # - page #)."

STATEMENT REGARDING ADOPTION OF BRIEFS OF OTHER PARTIES

Respondents, Daytona Community Hospital, Richard Boye, M.D. and Ralph Marino, M.D., hereby adopt the arguments and authorities contained in any Briefs in Opposition filed by Respondents, Alvin E. Smith, M.D., Shedrick W. Roberson, M.D. and Ormond Beach Memorial Hospital, as additional support for the arguments contained herein.

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STATEMENT OF THE CASE

The Respondents, Daytona Community Hospital, Richard Boye, M.D., and Ralph Marino, M.D., submit the following Statement of the Case, as they find the Statement submitted by the Petitioner inadequate and wish to supply important information that has been distorted or omitted altogether.

This action was filed on March 23, 1982 by Petitioner, Richard A. Bolt, M.D. [hereinafter "Bolt"], a general and vascular surgeon, on behalf of himself and his professional association, alleging that three hospitals located in Daytona Beach, Florida and five physicians practicing there, violated federal anti-trust laws by conspiring to deny his application for permanent staff privileges at those hospitals. The case was originally tried in 1984 and numerous appeals followed.[1]

On August 11, 1994, the case was tried for the second time, and after four days of trial, Bolt, then Plaintiff, with the advice of counsel, voluntarily agreed to the entering of an order dismissing the case with prejudice as to all Defendants. (ER-96-1). In exchange, Defendants agreed to waive any and all actions for costs against Bolt. (ER-96-1). On September 9, 1994, Bolt served a Notice of Appeal to the Eleventh Circuit Court of Appeals, asking for relief from dismissal and asserting that their voluntary dismissal was the result of a lack of prudent advice and undue influence.[2] (ER-98-1).

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1. *See Richard A. Bolt, M.D., et al. v. Halifax Hospital Medical Center, et al., slip op.*, Case No. 82-122-ORL-CIV-18 (M.D. Fla. Mar. 21, 1984), *aff'd in part, rev'd in part, and remanded*, 891 F.2d 810 (11th Cir.), *cert. denied*, 110 S. Ct. 1960 (1990); *see also Richard A. Bolt, M.D., et al. v. Halifax Hospital Medical Center, et al.*, 851 F.2d 1273 (11th Cir. 1988), *vacated*, 861 F.2d 1233 (11th Cir. 1988) (*en banc*), 891 F.2d 810 (11th Cir. 1990), *cert. denied*, 110 S. Ct. 1960, 980 F.2d 1381 (11th Cir. 1993).

2. In the United States Court of Appeals for the Eleventh Circuit, *Richard A. Bolt, M.D., et al., Appellants/Plaintiffs v. Halifax Hospital Medical Center, et al., Appellees/Defendants*, bearing Case No. 94-3149.

On September 28, 1994, Defendants filed a Motion to Dismiss Bolt's appeal. The Eleventh Circuit then dismissed Bolt's appeal on February 15, 1995. (ER-100-1). On July 16, 1996, Bolt filed a Motion for Relief from Judgment under Rule 60(b)4 and 60(b)6, Fed. R. Civ. P. in the District Court. (ER-107-1). The Honorable Robert R. Merhige, Jr. denied this Motion in an Order filed August 19, 1996. (R1-112-1). Bolt filed a Motion for Reconsideration which was also denied by the lower court in a Final Order filed October 21, 1996. (R1-114-1, R1-124-1). Bolt filed his Notice of Appeal in the Eleventh Circuit on November 18, 1996. (R1-125-1). The Eleventh Circuit affirmed Judge Mehrige's denials of Petitioner's Rule 60(b) motions on October 27, 1997, and denied a Petition for Rehearing and Suggestion for Rehearing En Banc of the same on May 12, 1998.

REASONS FOR DENYING THE WRIT

I.

THE TRIAL COURT DID NOT ABUSE ITS DISCRETION IN DENYING RELIEF UNDER RULE 60(b)4.

Petitioner Bolt's appeal is based on denial of a Motion for Relief from Judgment under Rule 60(b) of the Federal Rules of Civil Procedure, which is not to be used to disturb the finality of judgments, except on narrow grounds and only where there is a showing of exceptional circumstances. *See Smith v. Widman Trucking & Excavating*, 627 F.2d 792 (11th Cir. 1980). The rule is not intended to allow litigants to avoid the consequences of a decision to settle or dismiss their claim in retrospect. *See id.* at 795.

Further, the mandatory time limitations set out in Rule 60(b) are founded on a judicial interest in speedy disposition and

finality, and may not be extended for the reasons stated by the Petitioner. As this Court stated in *Ackermann v. United States*, there must be an end to litigation someday, and free, calculated, deliberate choices are not to be undone. 71 S. Ct. 209, 211-212 (1950). Bolt's decision was his own.

Bolt has failed to demonstrate that the trial court's judgment is void. Petitioner is not entitled to relief under Rule 60(b)(4), which authorizes a court to relieve a party from Final Judgment only where such judgment is void. The concept of void judgments usually arises for lack of subject matter jurisdiction or jurisdiction over the parties. *See V.T.A., Inc. v. Airco, Inc.*, 597 F.2d 220, 224 (10th Cir. 1979). As the judicial system has a substantial interest in preserving the finality of judgments, the concept of setting aside a judgment under Rule 60(b)(4) is very narrowly restricted. *Id.* at 225.

A void judgment has been defined as "one which, from its inception, was a complete nullity and without legal effect." *Lubben v. Selective Service System Local Bd. No. 27*, 453 F.2d 645, 649 (1st Cir. 1972). The court in that case stated that only in the rare instance of a "clear usurpation of power" will a judgment be rendered void. Petitioner's misinterpretation of the record results in unfounded charges of usurpation of power by Judge Merhige. Additionally, in *United States v. Boch Oldsmobile, Inc.*, 909 F.2d 657, 661 (1st Cir. 1990), the court stated a judgment is void only if the court lacked jurisdiction or if there were circumstances in which the court's action constituted a violation of due process. *See also Margoles v. Johns*, 660 F.2d 291, 295 (7th Cir. 1981), *cert. denied*, 102 S. Ct. 1256 (1982) (plaintiff must show more than simple error — they must show that a fundamental due process was in fact denied); *Marshall v. Board of Ed., Bergenfield, N.J.*, 575 F.2d 417, 422 (3d Cir. 1978) (judgment is not void merely because it may be erroneous).

The facts and circumstances of the 1994 trial did not constitute a fundamental denial of due process. In fact, Bolt agreed to "throw in the towel" in exchange for the Respondents' agreement not to seek any costs or attorneys fees. (ER-106-69). Bolt has presented no evidence whatsoever that the court acted improperly or that the conduct of the Honorable Robert R. Merhige, Jr. amounted to usurpation of judicial power, thereby denying fundamental due process. Judge Merhige explained to Bolt that his attorneys had moved to withdraw and that the case was down to a matter of economics. (ER-106-63). An examination of the record at trial confirms that the court sought to protect Bolt from the consequences of enormous costs, judgments and possible attorneys' fees. Bolt demonstrated on the record that he understood. (ER-106-71).

In contemplating Bolt's motion under Rule 60(b)4, the trial court found that he offered only a "general statement to the effect that the trial judge had acted in a manner inconsistent with the due process of law." (R1-113-3). The court stated that Bolt made

> no further attempt to elaborate on his conclusion concerning due process, nor does he state any facts in support of his contention that fraud had been committed by trial counsel.

(R1-113-3). Subsequently, Bolt filed an amended Rule 60(b)(4) motion after the trial court granted him the opportunity to set forth additional facts. (R1-112-1). This supplemental motion was considered and the court stated in a Memorandum Opinion that

> an examination of the entire trial transcript reveals that the proceeding was not conducted in a manner

> that deprived Bolt of notice, hearing, or any other fundamental constitutional right.

(R1-123-2).

Contrary to Bolt's assertions in his Petition, he was not denied an opportunity to be heard, he had an impartial trial judge and was not denied effective assistance of counsel, even though he was dissatisfied with them. A litigant is not denied due process by either the appearance of partiality or by circumstances which might lead one to speculate as to a judge's impartiality. Rather, a "litigant is denied due process if he is *in fact* treated unfairly." *See Margoles*, *supra* at 296 (emphasis in original). Bolt cannot demonstrate such unfair treatment.

Also, Bolt has provided no facts which indicate he was denied an opportunity to be heard in connection to his decision to voluntarily dismiss his claims on August 11, 1994. An examination of record reveals that Bolt, in fact, made a reasoned decision to voluntarily dismiss his claim with prejudice and was not denied any fundamental constitutional rights.[3] In *Boch*, *supra*, the court explained a strong judicial reluctance to disturb final judgments as follows:

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3. The relevant statements in the transcript are as follows:

> DR. BOLT: I guess we are over. Thank you very much. I guess we are all through. We will throw in the towel.
>
> THE COURT: You understand now that, by that I presume you mean you are willing to dismiss this with prejudice in exchange for them not seeking any costs.
>
> MR. LITCHFORD: Including Halifax Hospital.
>
> THE COURT: What do you mean including?

(Cont'd)

One of the basic tenants of our system of jurisprudence is that of finality of judgments. The

(Cont'd)

MR. LITCHFORD: They have got a pending motion for costs, and they have got common representation.

MR. CHRISTOPHER: They are backing Dr. Smith.

THE COURT: If it is a deal at all, it is a deal they don't come after you for costs whatsoever.

MR. LITCHFORD: All defendants.

THE COURT: Any of the parties to this suit. Now, is that your understanding, Doctor?

DR. BOLT: Uh hum.

THE COURT: Is that what you want? Not what you want, is that what you are going to do?

DR. BOLT: Uh hum.

THE COURT: Uh hum means yes, I gather.

DR. BOLT: Yes, sir.

THE COURT: All right.

(ER-106-69, line 20 through ER-106-70, line 16)

THE COURT: The lawyers agree to it?

MR. LITCHFORD: Yes, sir.

MR. CHRISTOPHER: Yes, sir.

DR. BOLT: They won't talk to the press about it.

(Cont'd)

> principle of finality is essential to insure consistency and certainty in the law. This solitary principle is founded upon the generally recognized public policy that there must be some end to litigation.

Id. at 660. The *Boch* court stated that it was particularly reluctant to reopen the judgment

> entered by consent because in making such agreements the parties have voluntarily and consciously decided not to contest the legal and factual elements of the case.

Id. Bolt voluntarily agreed to the entry of an Order which dismissed his claim with prejudice in exchange for the Petitioner's promise not to pursue any actions for court costs or attorneys' fees against him.

Finally, Bolt's allegations concerning the conduct and withdrawal of his own attorneys is wholly irrelevant and

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(Cont'd)

> THE COURT: Oh, no.
>
> MR. LITCHFORD: It is a settlement of the parties.

(ER-106-71, lines 3-8).

> THE COURT: I explained that I had asked if you all would pay anything and what your response was.
>
> I am authorized to enter an order, it is on the record, authorized to enter an order that — well, I did not tell them the phraseology, but it will be like this. Upon motion of the parties and deeming it proper so to do, it is adjudged and ordered that this action be and the same is hereby dismissed with prejudice; each party to pay its own costs.

(ER-106-71, lines 15-23).

immaterial to the relief sought in this appeal. Bolt sought to remedy those complaints in an independent legal malpractice action.[4] Bolt's present accusations in no way constitute competent evidence of a denial of due process and are plainly discernable as attempts to resurrect and protract this litigation.

II.

THE TRIAL COURT DID NOT ABUSE ITS DISCRETION IN DENYING RELIEF UNDER RULE 60(b)6.

With respect to relief requested by Petitioner, Bolt, under Rule 60(b)(6), the Eleventh Circuit Court of Appeals has articulated a standard of relief under this clause as an extraordinary remedy which may be invoked only upon a showing of exceptional circumstances. *See Griffin v. Swim-Tech Corp.*, 722 F.2d 677 (11th Cir. 1984); *See also Cavaliere v. Allstate Ins. Co.*, 996 F.2d 1111, 1115 (11th Cir. 1993). The Eleventh Circuit has also emphasized that "final judgment should not be lightly reopened" due to the "desirability for order and predictability in the judicial process . . . " 722 F.2d at 680. Bolt has utterly failed to carry out his burden showing that Rule 60(b)(6) relief is necessary to avert the exceptional circumstances of the extreme and unexpected hardship.

Bolt's arguments for relief under this rule merely indicate his subsequent dissatisfaction with the ramifications of his voluntarily dismissal. It is well-settled that hindsight does not constitute grounds for relief. *See Ackermann, supra*, at 211 (party cannot be relieved of choice because hindsight seems to indicate it was probably wrong); *Andrulonis v. United States*, 26 F.3d

4. In the Circuit Court of the Ninth Judicial Circuit, In and For Orange County, Florida, *Dr. Richard A. Bolt and Richard A. Bolt, M.D., P.A., Plaintiff, v. Litchford & Christopher, P.A., Hal K. Litchford, Individually and Donald E. Christopher, Individually, Defendants*, Case No. CI-95-6593.

1224, 1235 (2d Cir. 1994) (Rule 60(b) does not enable a court to indulge a party's discontent as to the result of its bargain); *United States v. Bank of New York*, 14 F.3d 756, 759 (2d Cir. 1994) (a party who makes a choice to settle cannot be relieved of that choice, "merely because of her assessment of the consequences was incorrect"); *Lloyd v. Carnation Co.*, 101 F.R.D. 346, 348 (M.D.N.C. 1984) (Rule 60(b) is not meant to relieve any litigant of strategic or tactical decisions which later prove to be improvident); *In re: Master Key Anti-trust Litigation*, 76 F.R.D. 460 (D. Conn. 1977) (party cannot seek Rule 60(b) relief where his assessment of the consequences of the settlement was incorrect).

As a general rule, no matter how unjust one party may later come to regard a settlement, if it is free from fraud, it cannot be attacked. Likewise, if subsequent developments do not meet the expectations of the settling party, the settlement is not open to collateral attack based upon advice of counsel and undue influence. *Oaks v. City of Fairhope, Ala.*, 515 F. Supp. 1004 (S.D. Ala. 1981); *see also Petty v. Timken Corp.*, 849 F.2d 130, 133 (4th Cir. 1988) (when a litigant voluntarily accepts an offer of settlement, the integrity of the settlement cannot be attacked on the basis of inadequate advice by the litigant's attorney).

It is undisputed that the Respondents agreed to waive all fees and costs in exchange for Bolt's voluntary dismissal. This was communicated to Bolt by his counsel, and he agreed to voluntarily dismiss the case after a conference with his attorneys and the Honorable Robert R. Merhige, Jr. (ER-106-1). Bolt obviously continues to have second thoughts about the voluntary dismissal. This, in and of itself, does not establish unfairness or justify the setting aside of an otherwise valid and voluntary dismissal, especially considering Bolt did not properly preserve this issue for appeal pursuant to the Federal Rules of Civil Procedure and was thus denied appellate review.

Bolt's Rule 60 motion to the lower court stated that the case involved not only a "blunder of counsel," but also conduct of the Honorable Robert R. Merhige, Jr., which Bolt states in the motion, was "concerted" indicating a conspiracy between his attorneys and the Judge, which is patently absurd. (ER-107-9). Bolt made confusing arguments and claims of newly discovered evidence and fraud of parties and his own counsel, whose alleged ineffective representation is mentioned throughout.

To the extent Bolt argues fraud of his attorneys as a basis for relief, which in any event is not relevant to the Petitioners, he was entitled to an independent action of legal malpractice as a remedy which he did pursue and settle. Rule 60(b)6 does not allow a court to relitigate matters a party believes were improperly handled by his hired counsel. It has long been held that the mistakes of counsel are chargeable to the client. *See Link v. Wabash Railroad Co.*, 82 S. Ct. 1386, 1390 (1962). Lastly, Constitutional arguments made by Bolt suggesting ineffective assistance of counsel are simply inapplicable in this civil matter where he selected and hired his own counsel.

The trial court issued a memorandum opinion on Bolt's Motion for Relief from Judgment under Rule 60(b)6, stating why it was denied on the merits. (R1-113-1). The trial court stated that "there must be an end to the litigation," and that Bolt's "having consented to the judgment, and the judgment having been entered" and unsuccessfully appealed, "this case is at an end." (R1-113-3). As such, Bolt has not provided any new reasons to justify relief under Rule 60(b)(6) aside from paranoid and speculative explanations which amount to pure conjecture.

III.

PETITIONER IMPROPERLY CALLS FOR THE EXERCISE OF THE SUPERVISORY POWER OF THIS COURT, BUT, IN ANY EVENT, IS BARRED BY THE LAW OF THE CASE DOCTRINE.

Under Rule 10 of the Rules of the Supreme Court, the supervisory power of this Court may be invoked only when a United States court of appeals has sanctioned a departure far from the accepted and usual course of judicial proceedings. Though Petitioner would have this Court believe such a departure is evident in his essay erroneously entitled "judicial activism," such activity has not occurred in the lower court.

As a general rule, a consenting party cannot appeal an order granting a voluntary dismissal of an action. *See McGregor v. Board of Com'rs of Palm Beach County*, 956 F.2d 1017 (11th Cir. 1992); *Studstill v. Borg Warner Leasing*, 806 F.2d 1005 (11th Cir. 1986). The Eleventh Circuit has consistently held that a party who has consented to a judgment may not appeal issues that have been settled by that judgment unless they have expressly reserved the right to do so. *See Dorse v. Armstrong World Industries*, 798 F.2d 1372, 1374-77 (11th Cir. 1986); *White v. C.I.R.*, 776 F.2d 976 (11th Cir. 1985); *Shores v. Sklar*, 885 F.2d 760, 764 (11th Cir. 1989), *cert. denied*, 493 U.S. 1045 (1990); and *Wynfield Inns v. Edward LeRoux Group, Inc.*, 896 F.2d 483 (11th Cir. 1990).

Petitioner, Bolt, has not reserved the right to appeal any issue in this case. Bolt was represented by counsel and aware of the ramifications of agreeing to a voluntary dismissal with prejudice. As such, the Eleventh Circuit dismissed Bolt's claim for relief on February 15, 1995, stating that his agreement to the entry of judgment in this case without reservation of the

right to seek appellate review of any issue barred the appeal. (ER-100-1). That Order is the law of the case.

Under the Law of the Case doctrine, findings of fact and conclusions of law by the appellate court are binding in all subsequent proceedings in the same case in trial courts and courts of appeal. *See, e.g., Heathcoat v. Potts*, 905 F.2d 367 (11th Cir. 1990); *Westbrook v. Zant*, 743 F.2d 764 (11th Cir. 1984) (purpose of Law of the Case doctrine is to ensure the litigation will come to an end and to assure the obedience of lower courts to appellate court decisions).

The only circumstance in which the Law of the Case doctrine would not preclude a later appeal from deciding an issue decided on a previous appeal, is if that prior decision was clearly erroneous and would create manifest injustice. *Heathcoat*, 905 F.2d at 872. This is certainly not the case, as has been argued above. By utilizing Rule 60(b) for an unintended purpose, Bolt has attempted to evade the Eleventh Circuit's dismissal of his prior appeal, even though the Law of the Case doctrine bars reconsideration of those issues already appealed.[5]

Petitioner Bolt's rambling argument for a Writ of Certiorari is an improper, baseless and frivolous attempt to have the order dismissing his case vacated following a conscious and voluntary decision he made at trial twelve years into this litigation which has inevitably arrived in the court of last resort.

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5. In the Eleventh Circuit's Order of February 15, 1995, granting Appellees' Motions to Dismiss Bolt's appeal, Chief Judge Tjoflat and Circuit Judges Dubina and Barkett stated that Bolt's "agreement to the entry of judgment in this case without reservation of the right to seek appellate review of any issue" barred the appeal. For this proposition, the judges cited *Shores v. Sklar*, 885 F.2d 760, 762 (11th Cir. 1989), *cert. denied*, 394 U.S. 1045 (1990), and this Court's decision of *Swift & Co. v. United States*, 276 U.S. 311, 324 (1978).

CONCLUSION

For the foregoing reasons, the instant Petition for Writ of Certiorari should be denied.

Respectfully submitted,

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